1992

Salt Lake City v. Teja Trujillo : Brief of Appellee

Utah Court of Appeals

Richard P. Mauro; Salt Lake Legal Defender Association; Attorney for Defendant/Appellant.
Stephen P. Hollinger; Assistant Salt Lake City Prosecutor; Attorney for Plaintiff/Appellee.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

SALT LAKE CITY, A Municipal Corporation,	:	
Plaintiff/Appellee,	:	
vs.	:	CASE NO. 92-0078-CA
TEJA TRUJILLO,	:	
Defendant/Appellant.	:	Priority No. 2

BRIEF OF APPELLEE

APPEAL BY DEFENDANT OF CONVICTION FOR UNLAWFUL POSSESSION A CONTROLLED SUBTANCE, A CLASS B MISDEMEANOR, IN VIOLATION OF 11.24.020 OF THE REVISED ORDINANCES OF SALT LAKE CITY, IN THE THIRD CIRCUIT COURT, SALT LAKE DEPARTMENT, SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE ROBIN W. REESE, JUDGE, PRESIDING.

STEPHEN P. MOLLINGER, #5830
Assistant Salt Lake City Prosecutor
451 South 200 East, #125
Salt Lake City, Utah 84111
Telephone (801) 535-7767

Attorney for Plaintiff/Appellee

RICHARD P. MAURO
Salt Lake Legal Defender Assoc.
424 East 500 South, #300
Salt Lake City, Utah 84111
Telephone: (801) 532-5444

Attorney for Defendant/Appellant

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

SALT LAKE CITY, A Municipal Corporation,	:	
Plaintiff/Appellee,	:	
vs.	:	CASE NO. 92-0078-CA
TEJA TRUJILLO,	:	
Defendant/Appellant.	:	Priority No. 2

BRIEF OF APPELLEE

APPEAL BY DEFENDANT OF CONVICTION FOR UNLAWFUL POSSESSION OF A CONTROLLED SUBTANCE, A CLASS B MISDEMEANOR, IN VIOLATION OF 11.24.020 OF THE REVISED ORDINANCES OF SALT LAKE CITY, IN THE THIRD CIRCUIT COURT, SALT LAKE DEPARTMENT, SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE ROBIN W. REESE, JUDGE, PRESIDING.

STEPHEN P. ZOLLINGER, #5838
Assistant Salt Lake City Prosecutor
451 South 200 East, #125
Salt Lake City, Utah 84111
Telephone (801) 535-7767

Attorney for Plaintiff/Appellee

RICHARD P. MAURO
Salt Lake Legal Defender Assoc.
424 East 500 South, #300
Salt Lake City, Utah 84111
Telephone: (801) 532-5444

Attorney for Defendant/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

CONSTITUIONAL PROVISIONS, STATUTES AND ORDINANCES

STEPHEN P. ZOLLINGER, #5838
Attorney for Plaintiff/Appellee
451 South 200 East, #125
Salt Lake City, Utah 84111
Telephone: (801)-535-7767

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

SALT LAKE CITY, A Municipal Corporation,	:	
Plaintiff/Appellee,	:	
vs.	:	CASE NO. 92-0078-CA
TEJA TRUJILLO,	:	
Defendant/Appellant.	:	Priority No. 2

JURISDICTIONAL STATEMENT

Jurisdiction is conferred upon this Court pursuant to Utah Code Ann. Section 78-2a-3(2)(f) (1992 Supp.)

STATEMENT OF THE ISSUES

1. **Was the warrant authorizing the search of defendant's residence supported by probable cause?**

2. **Did the magistrate properly authorize the execution of the search on a no-knock, nighttime basis?**

3. **If the search warrant was defective in any of the above respects, is suppression of the evidence seized during the search required?**

STANDARD OF REVIEW

In considering an appeal of a motion to suppress denial, the Court of Appeals should give deference to the trial court's findings of fact, and be governed by a "clearly erroneous" standard. State v. Smith, 781 P.2d at 881. Under federal law, a magistrate's probable cause determination is given great deference on review. Illinois v. Gates, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331 (1983). The affidavit supporting a search warrant application must, however, provide a "substantial basis for determining the existence of probable cause." Gates, 462 U.S. at 239, 103 S.Ct. at 2332, quoted in United States v. Leon, 468 U.S. 897, 915, 104 S.Ct. 3405, 3416 (1984). The "substantial basis" requirement entails limited review of the magistrate's determination, asking only whether the affidavit contains sufficient factual information upon which a magistrate could have found probable cause. See Gates, 462 U.S. at 226, 103 S.Ct. at 2326. The question of whether the state constitution requires less deferential review is a policy question, and hence one of law.

A magistrate's authorization of a no-knock, nighttime search is held to be improper only if the warrant affidavit, read as whole, fails to support an inference that if the searching officers first announce their purpose, evidence may be lost, or physical harm may result to any person. See State v. Rowe, 806 P.2d 730, 732-33 (Utah App.)(construing Utah Code Ann. ss77-23-10(1990)), cert. granted, 817 P.2d 327 (Utah 1991). Thus deferential review of no-knock nighttime authorization is appropriate.

The question of whether a "good faith exception" to the exclusionary rule exists under the Utah Constitution, as it does under the United States Constitution, appears to be one of policy, and therefore law, reviewed without deference to a trial court's analysis. See State v. Thompson, 810 P.2d 415, 420 (Utah 1991), and Rowe, 806 P.2d at 740 (Garff, J., concurring)(both deferring the issue).

Questions of law which flow from these factual findings are to reviewed under a "correctness" standard. State v. Lopez, 181 Utah Adv. Rep. 41, 42; State v. Steward, 806 P.2d 213, 215 (Utah App. 1991).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

The fourth amendment to the United States Constitution and Article I, section 14 of the Utah Constitution contain virtually identical text. The fourth amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Utah's "no-knock" search warrant statute, Utah Code Ann. ss77-23-10 (1990), reads, in pertinent part:

> When a search warrant has been issued authorizing entry into any building, room, conveyance, compartment or other enclosure, the officer executing the warrant may use such force as is reasonably necessary to enter:
>
> (2) Without notice of his authority and purpose, if the magistrate issuing the warrant directs in the warrant that the officer need not give notice. The magistrate shall so direct only upon proof, under oath, that the object of the search may be quickly destroyed, disposed of, or secreted, or that physical harm may result to any person if notice were given.

STATEMENT OF THE CASE

This case involves the denial of a motion to suppress evidence seized during a warrant-supported search of defendant's home. The facts and trial court proceedings are as follows:

Statement of the Facts

The critical facts are set forth in the search warrant affidavit. The affidavit was submitted by Paul Gardiner of the Salt Lake County Metro Narcotics Strike Force, an experienced narcotics investigator, and had been reviewed by a county attorney (see affidavit attached to appellants brief as addendum "C", at 4). Detective Gardiner sought a warrant to search the home of the defendant Teja Trujillo, for cocaine, paraphernalia, packaging materials, currency, narcotics records, and residency papers (affidavit attachment "a").

The most significant item in the affidavit, as identified by the trial court, is the recitation by Gardiner, of the events surrounding the cocaine purchase which took place at the address in question, within 72 hours prior to the issuance of the warrant (affidavit at 3). That purchase was a "controlled buy", made through one of the confidential informants. The informant was subjected to a pre- and post-purchase search, and kept under surveillance as he entered and left the home (id.). The informant reported that the defendant had been present during the purchase of cocaine at the home.

Additionally, there were two other confidential informants who gave information to the Metro Narcotics Strike Force on prior occasions with regards to the defendant and the other two individuals named in the warrant (affidavit at 3).

Based on the information available to Detective Gardiner, and his experience in narcotics investigation, a warrant to search the persons of defendant and two other individuals who were present during the "controlled buy" was requested, together with authorization to search the premises. The warrant was sought as a no-knock, nighttime warrant based on Detective Gardiner's statement that in his experience, drug traffickers frequently possess firearms, cocaine is easily and quickly disposed of, and that at this particular address, the residents did not open their door without asking who it was first.

The warrant and no-knock, nighttime authority were issued as requested. The entry and search were carried out, and small amounts of marijuana were located on the premises.

Trial Court Proceedings

Defendant was charged with unlawful possession of a controlled substance, a class B misdemeanor, in violation of 11.24.020 of the Revised Ordinances of Salt Lake City. She moved to suppress the seized evidence.

The motion to suppress asserted only that the "warrant was invalid", and referenced the Fourth and Fourteenth Amendments to the United States Constitution and Article I, section 14 of the Utah Constitution. There was no memorandum in support offered,

but at the hearing, defendant indicated that the basis for the motion to suppress was three fold (see transcript at 1).

The first argument raised by the defendant was with respect to the reliability of informants, and the standard of scrutiny employed by the magistrate. The second issue was with the truthfulness of the affidavit, and the final issue was with the issuance of the warrant as a no-knock, nighttime authorization.

The trial court denied the motion to suppress. It first found that there was ample probable cause to indicate that the warrant should be authorized. The court stated that the controlled buy, together with the information from the other confidential informants was sufficient to justify the warrant being issued, clearly basing this decision on the truthfulness of Detective Gardiner's details of the controlled buy (transcript at 55).

The court next addressed the no-knock authorization, and found that all though there were numerous items to be seized if found, clearly the primary purpose for the warrant was to search for cocaine, and the nature of cocaine, being easy to dispose of, allows for the no-knock warrant authority.

Finally, the court found that the fact that they did not find what they were looking for, "does not in any way, indicate that the affidavit is not sufficient on its face" (transcript at 56).

The motion to suppress having been denied, the defendant pleaded guilty to unlawful possession of a controlled substance, as charged, reserving her right to appeal the denial of her

motion. She was sentenced on October 3rd, 1991 to serve 30 days beginning October 4th, 1991. This appeal ensued.

SUMMARY OF THE ARGUMENT

The trial court, having heard the evidence, ruled properly in finding that Judge Robin W. Reese acted properly in authorizing a no-knock, nighttime search warrant.

The "no-knock", nighttime authorization was proper. The standard of proof for such authorization should be lower than that required to issue the underlying warrant. This is so because once a warrant has been issued, concern shifts to a determination of how the search can most effectively and safely be conducted. Here, cocaine, an easily hidden, easily destroyed or discarded substance was sought; it might be lost if the search were announced. More importantly, the fact that drug dealers are frequently armed, plus specific information about the location of the cocaine in the defendant's home, supported a no-knock authorization.

Because there is little question that the underlying warrant is valid, the City's "good faith exception to suppression" argument is limited to the closer questions of no-knock and nighttime authorization. If that authorization is found to be defective, suppression of the seized evidence is inappropriate. It is not clear that evidence should ever be suppressed where the only search defect is an improper no-knock, nighttime entry. Further, reasonable officer reliance on a warrant that is later held defective should weigh against

suppression, under both federal and state law principles. Application of this rule is especially justified here, because the no-knock authority granted in this warrant was completely consistent with the most recent case holding on the issue.

ARGUMENT

I. THE MAGISTRATE'S PROBABLE CAUSE DETERMINATION AND ISSUANCE OF THE SEARCH WARRANT SHOULD BE REAFFIRMED ON APPEAL

The City treats Points I and II of the defendant's brief on appeal as a challenge to the magistrate's probable cause determination and issuance of the underlying search warrant. Defendant argues that stricter probable cause review should be undertaken under Article I, section 14 of the Utah Constitution than traditionally occurs under the fourth amendment. Her argument should be rejected.

A. The Search Warrant Affidavit Established Probable Cause that Criminal Evidence Would be Found in Defendant's Home

The trial court did rule that the underlying warrant was validly issued, holding that probable cause existed based on the personal observations of Detective Gardiner, as buttressed by the three informants. In reviewing the probable cause ruling and the issuance of the underlying warrant, defendant's challenge fails on its merits.

1. Reasons for Deferential Appellate Review

The trial court's "sufficient basis" ruling comported with the fourth amendment rule that a magistrate's probable cause

determination is deferentially reviewed, and reversed only if it is clearly erroneous; that is, only if it had no "substantial basis." State v. Babbell, 770 P.2d 987, 990-91 (Utah 1989); State v. Purser, 828 P.2d 515, 516-517 (Utah App. 1992). Accord United States v. Leon, 468 U.S. 897, 914-15, 104 S.Ct. 3405, 3416 (1984). Defendant, however, urges a departure from this rule under Article I, section 14 of the Utah Constitution, asking for non-deferential, de novo review of the magistrate's probable cause determination. Derived from concurring comments in State v. Weaver, 817 P.2d 830 (Utah App. 1991), defendant's argument should be rejected.

Concurring in Weaver, Judge Orme asked why a search warrant affidavit should not be reviewed on appeal as "a question of law, with no particular deference accorded." 817 P.2d at 836. One answer is that magistrates, no less than their colleagues on appellate benches, are sworn to uphold the federal and state constitutions. U.S. Const. Art VI, cl. 3; Utah Const. Art. IV, section 10. Absent the clearest showing that this sworn duty has been abdicated, a magistrate's probable cause ruling should be respected as a conscientiously considered decision, made in full awareness of the involved constitutional principles.

Judge Orme also criticized deferential review of warrants and warrant affidavits as a means of encouraging police officers to seek warrants, a rationale advanced by the federal Supreme Court. 817 P.2d at 835. But if warrant affidavits are nondeferentially reviewed on appeal, magistrates may feel less incentive to scrutinize them carefully. Better to simply issue

the warrant without fuss, and let the appellate court, with the "luxury of group decision-making, more time, and research assistance," id., decide later whether the affidavit was sufficient. Thus nondeferential review of warrants may actually weaken the interpretation of the judicial branch between citizens and police before a search occurs, interposition that is the "bulwark" of search and seizure protection. Franks v. Delaware, 438 U.S. 154, 164, 98 S.Ct. 2674, 2681 (1978).

Additionally, because it occurs before a search, a magistrate's probable cause determination is arguably more objective than one made after-the-fact. Before issuing a search warrant, the magistrate must find "a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gate, 462 U.S. 213, 235, 103 S.Ct. 2317, 2332 (1983) (emphasis added). Hindsight based review of warrants, however, may be colored by matters extraneous to this pre-search probable cause determination.

Further, unlike "other writings," such as contracts, a warrant affidavit merely asks permission to conduct a search. It is the magistrate who, upon an assessment that probable cause exists, issues the "contract," of warrant, ordering officers to search the identified place. See Utah Code Ann. section 77-23-1 (1990)("a search warrant is an order . . . directed to a peace officer . . ."). Thus, principles of contract interpretation, cf. Weaver, 817 P.2d at 836 (Orme, J., concurring), are inapplicable to warrant affidavits.

It is also appropriate to defer to a probable cause ruling that has been affirmed by the trial court after the search, as occurred here. In such instances, the defendant has had a full opportunity to attack the sufficiency of the warrant affidavit. When such attacks fail, the appellate court faces a situation wherein two judicial officers have already approved the challenged search. Therefore, particularly in a close case, deference is appropriate, cf. Weaver, 817 P.2d at 835 (Orme, J., concuring). Indeed, reversal upon a two-to-one split appellate decision would actually reflect a three-to-two determination of all judges that the warrant was valid. Thus nondeferential appellate warrant review could actually foster inconsistent, unpredictable results. Cf. State v. Vigil, 815 P.2d 1296, 1299-1300 (Utah App. 1991).

Finally, deferential review of search warrants, and of trial court rulings upholding those warrants, is appropriate in light of the cost of suppressing evidence: most typically, a societal cost is paid, in that guilty defendants go free. That cost should be due only upon the clearest showing that the challenged evidence was obtained in violation of constitutional rights, especially when front-line magistrates and trial courts have already ruled to the contrary.

In the end, defendant's argument for de novo appellate review of warrant-supported searches amounts to an assertion that such searches should be invalidated if an appellate court majority decides that it would not have issued the warrant in the first instance. This is wrong. Until and unless appellate

courts themselves assume the burden of issuing warrants, the efforts of the traditional front-line judicial decision makers should be subject to reversal only for clear error.

2. Marshalling the Evidence

Concomitant with express adoption of a "clearly erroneous" based standard of review for warrant-supported searches under the state constitution, this Court should apply an evidence-marshalling requirement to such review. This requirement is already in place for challenges to criminal guilt findings. See State v. Moore, 802 P.2d 732, 738-739 (Utah App. 1990). Marshalling essentially requires an appellant to confront the strongest adverse evidence head-on, and to demonstrate why that evidence does not support the challenged judgement. Id. at 738. This "aids the appellate courts in deliberations and in the opinion-writing process." Id. at 739.

This case illustrates why the marshalling standard should also apply to appeals from motions to suppress evidence. Defendant's appellate brief attempts to evade the impact the controlled cocaine buy in her home had to have on the magistrate's decision to issue the warrant. Defendant's attempt to confuse the issue of whether the buy actually took place at the named residence, is a blatant misrepresentation of the facts that she herself dealt extensively with. The cross examination dealt exhaustively with the buy at the named residence from approximately 3/4 of the way down on page 11 of the transcript, to half way down page 16, leaving no doubt that the affidavit was clear on its face, and was not controverted by Detective Gardiner's testimony at the hearing.

Even a single controlled drug buy, within a week of the warrant affidavit, is sufficient to establish probable cause. See State v. Ayala, 762 P.2d 1107, 1110 (Utah App. 1988). The controlled buy in this case occurred within 72 hours preceding this affidavit (affidavit at 3). The City is aware of no case where a warrant based upon recent controlled buys has been held invalid. Even where such purchases are less-than-ideally controlled, because an "unwitting" intermediary is the conduit between the confidential informant and the suspected drug dealer, probable cause determinations and the issuance of warrants have been upheld on appeal. See State v. Purser, 828 P.2d 515, 516 (Utah App. 1992), and cases cited therein.

Viewed in this light, defendant's skirting of the controlled buy issue, and the statements which placed the defendant present at the controlled buy in her own home represents, at best, unhelpful appellate briefing. It suggests an attempt to confuse the real issues, by deliberately misconstruing testimony which defendant herself belabored. To forestall such problems in the future, once a search warrant has been issued, or a motion to suppress has be decided in the trial court, an evidence-marshalling standard should apply to efforts to reverse those decisions on appeal.

3. "Totality of the Circumstances" the Test.

Defendant asks this Court to adopt a strict "informant reliability" approach to probable cause and search warrant issuance under the Utah Constitution. This approach is dubbed the "two-pronged" "Aguilar-Spinelli" test, after Aguilar v.

Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584 (1969). In essence, the approach requires that when a search warrant request is supported by informants' statements, the informants' "basis of knowledge" and "veracity" must be established for the magistrate. See Illinois v. Gates, 462 U.S. 213, 228 nn. 3-4, 103 S.Ct. 2317, 2327 nn. 3-4 (1983).

In Gates, the United States Supreme Court rejected a strict "informant reliability" approach, adopting instead a common sense-based, "totality of the circumstances" approach under the fourth amendment. 462 U.S. at 235, 103 S.Ct. at 2332. This approach has been embraced by Utah's appellate courts. See State v. Anderson, 701 P.2d 1099, 1101-02 (Utah 1985); State v. Purser, 828 P.2d at 516 (Utah App. 1992). Informant reliability does remain a factor in the "totality" analysis. Anderson, 701 P.2d at 1101; Purser, 828 P.2d at 516; accord Gates, 462 U.S. at 230, 103 S.Ct. at 2328. However, where informant reliability is unsure, independent police investigation can compensate, establishing probable cause. See State v. Bailey, 675 P.2d 1203 (Utah 1984)(police investigation corroborated informant's tip).

Defendant argues that under Article I, section 14 of the Utah Constitution, informant reliability should be a sine qua non for probable cause and search warrant issuance. However, Utah courts have expressed no dissatisfaction or difficulty with the "totality" approach. Compare State v. Larocco, 794 P.2d 460, 466, 469 (Utah 1990)(plurality opinion)(finding federal automobile search law "intolerably confusing," and attempting to

"simplify" it under the state constitution). Indeed, this Court has applied the test to search warrants under Article I, section 14. See State v. Miller, 740 P.2d 1363, 1365 (Utah App. 1987). Accordingly, there is no compelling reason to depart from the Gates totality of the circumstances test.

Defendant cites a number of cases that reject the totality of the circumstances approach, retaining an Aguilar-Spinelli informant reliability requirement under state constitutions. Often, however, that requirement has been retained in name only, with the courts holding that informant reliability problems can be overcome, and probable cause established, through independent police investigation. See Commonwealth v. Upton, 476 N.E.2d 548, 557 (Mass. 1985); State v. Jackson, 688 P.2d 136, 144 (Wash. 1984); State v. Jacumin, 778 S.W.2d 430, 437 (Tenn. 1989). Thus these decisions actually represent a totality of the circumstances approach.

Other cases deal with warrants issued solely upon informant statements, with no independent investigation. E.g., People v. Griminger, 71 N.Y.2d 635, 524 N.E.2d 409, 410 (1988)(but failing to address fruits of earlier consent search as basis for probable cause); State v. Jones, 706 P.2d 317, 319-20 (Alaska 1985); People v. Serbine, 421 Mich. 502, 364 N.W.2d 658 (1985). These cases properly demonstrate that where informant statements are the only basis for probable cause, the informants had better be reliable; this requirement is retained under the totality of the circumstances test. See Bailey, 675 P.2d at 1205 ("even under [the Gates] standard, compliance with the Aguilar-Spinelli

guidelines may be necessary to make a sufficient basis for probable cause").

In no case cited by the defendant has a warrant been invalidated where it was supported, as happened here, by clear independent evidence of obviously illegal conduct. Therefore, defendant's argument for a strict "informant reliability" approach to warrant affidavits is unpersuasive, and should be rejected.

4. Failure of "Utah History" Argument.

Finally, a short comment on defendant's historical analysis of why the Utah Constitution should provide broader search and seizure protection that the fourth amendment to the United States Constitution. Relating heavy-handed searches by federal officers against pre-statehood Mormon polygamists, defendant asserts that the framers of Utah's constitution intended "more stringent requirements" for searches under the state constitution than existed under the fourth amendment.

This proposition is highly unlikely, when one considers that the drafters, rather than drafting a significantly different search and seizure provision, adopted the fourth amendment practically verbatim. Utah's provision, Article I section 14, was apparently approved by the Utah Constitutional Convention without debate. Wallentine, Heeding the Call: Search and Seizure Jurisprudence Under the Utah Constitution, Article I, Section 14, 17 Utah J. Contemp. L. 267, 275 (1991). Further, Article III of the Utah Constitution prohibits religious persectuion and outlaws religious protection and eliminates the root cause of the search

and seizure abuses that its framers had experienced. This strongly suggests that the framers did not intend stronger general protection against searches and seizures than the fourth amendment provided; they provided additional protection for religious practices only. This case does not involve a search related to religion, and is thus not entitled to the stronger protections set forth under Article III.

In sum, defendant's request for de novo appellate review of search warrants and the supporting affidavits should be rejected in favor of deference to the front-line magistrates and trial courts; further, an evidence-marshalling standard should apply to such review. Her request for application of a strict "informant reliability" approach to search warrants under the Utah Constitution is patently unsound. Accordingly, the magistrate's probable cause determination and issuance of the underlying search warrant in this case, already affirmed by the trial court, should now be reaffirmed.

II. THE MAGISTRATE PROPERLY AUTHORIZED THE "NO-KNOCK" EXECUTION OF THE SEARCH.

Defendant next contends that the magistrate erred in authorizing the search to be conducted as an "no-knock", nighttime search. Under the correct standards of review and proof for no-knock, nighttime authorization, this argument should be rejected.

A. No-Knock Warrant Authorization Should be Deferentially Reviewed for Reasonableness.

By its terms, Utah's no-knock statute comes into play only "[w]hen a search warrant has been issued . . ." Utah Code Ann. section 77-23-10 (1990). Its focus is not probable cause, but only the question of how the search will be conducted. See State v. Buck, 756 P.2d 700, 703 (Utah 1988)(no-knock challenge did not assail underlying search, but only "the manner of entry"). For no-knock search, the statute requires "proof" that if the search is announced, evidence "may" be lost, or that personal physical harm "may" result. Utah Code Ann. section 77-23-10(2).

Defendant emphasizes the statutory "proof" requirement, however, the "may" language should be emphasized, and construed to require a standard of proof for no-knock authority that is less than the probable cause standard for issuance of the underlying warrant. So long as some case-specific evidence supports the issuance of a no-knock, nighttime warrant, a magistrate's authorization should be deferentially reviewed, and reversed only if it is clearly unreasonable. There are several good reasons for such an approach.

First, by definition, a search warrant defeats the privacy expectation of the subjects of the search. There is no question of consent; the search is going to occur even over resistance. In their expertise, the searching officers can anticipate the likelihood and form of such resistance, whether efforts to conceal the sought after contraband are likely, physical resistance to officer entry or any combination of these things. In carrying out the warrant's command to enter a particular place and seize particular things, Utah Code Ann. section 77-23-1

(1990), officer expertise about how best to follow that command should be respected. See Dalia v. United States, 441 U.S. 238, 257, 99 S.Ct. 1682, 1693 (1978)(question of how to conduct warrant-authorized search "is generally left to the discretion of the executing officers," subject to reasonableness requirement). The language of the Utah no-knock statute properly allows the magistrate to respect that expertise; reviewing courts, in turn, should defer to the magistrate's no-knock, nighttime authorization.

Second, where probable cause exists, it is reasonable to believe that the criminal suspects wish to thwart any search. The element of surprise may be needed to overcome the suspects' efforts toward that end. A request for a no-knock, nighttime search authority, providing that element, should not be overscrutinized, especially where the nature of the criminal activity--such as cocaine dealing--facilitates easy destruction or secreting of the contraband. State v. Rowe, 806 P.2d 730, 732-33 (Utah App.), cert. granted, 817 P.2d 327 (Utah 1991)(small amounts of drugs suspected). See also, State v. Miller, 740 P.2d 1363, 1365-67 (Utah App. 1987), and State v. Valento, 405 N.W.2d 914, 920 (Minn. App. 1987)(showing of large-scale operations supported no-knock authorization).

Finally, a no-knock, nighttime search will often be advisable for physical safety reasons. In general, "American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more wounded." Terry v. Ohio, 392

U.S. 1, 23, 88 S.Ct. 1868, 1881 (1968). More specifically, Utah courts have noted that drug dealers are often armed. State v. Dorsey, 731 P.2d 1085, 1092 (Utah 1986)(Zimmerman, J., concurring); Accord People v. Hughes, 767 P.2d 1201, 1204-05 (Colo. 1989). Further, in Utah, possession of firearms for "defense of . . . property" is constitutionally endorsed. Utah Const. Art. I, section 6. The likelihood of violence upon an unconsented home entry, especially where criminal activity is already suspected, is therefore very real.

Accordingly, when law enforcement officers have obtained a warrant, and thereby assumed a duty to search a given place, their request to enter the place on a no-knock, nighttime basis should be granted if it is reasonable. No-knock, nighttime authority should be refused, or reversed on review, only if no evidence particular to the case at hand, gleaned from the warrant affidavit as a whole, supports it. See Rowe, 806 P.2d at 732-33.

B. The Trial Court Properly Upheld the Magistrate's No-Knock Search Authorization.

Under the foregoing standard, the magistrate's no-knock, nighttime authorization should be reaffirmed on appeal. The trial court noted that ready loss or destruction of the cocaine in defendant's home was a possibility (transcript at 56).

No-knock authority was also supported as a matter of safety. Consistent with the concurrence in Dorsey, cited above, and with the confirmed criminal history of the defendant, in combination with the suspected cocaine dealing, it was reasonable to issue the no-knock, nighttime warrant for safety reasons. With reasonableness as the standard, this ruling was correct.

This case clearly shows the safety risk as did State v. Purser, 828 P.2d 516 (Utah App. 1992). Defendant here had prior criminal history, as did defendant Purser.

In State v. Roybal, 716 P.2d 291 (Utah 1986), the Court affirmed the reasonableness of precautions when officers "enter hostile environs." Id. at 293-94 (citing Terry), and a home that is to be entered pursuant to a probable cause finding is presumptively "hostile."

Further, affiant Gardiner's statement that "drug traffickers frequently possess firearms" (affidavit at 6) was not challenged in defendant's motion to suppress. Gardiner specifically states that he "has been on numerous narcotics search warrants where the suspects have firearms readily available."

Defendant cites a Washington case State v. Schmidt, 740 P.2d 351, as a basis for not granting no-knock warrant, however, Schmidt appears to overstate the quantum and reliability of proof that should apply to taking of safety precautions when executing a search warrant, and appears to contradict the Utah view in State v. Banks, 720 P.2d 1380, 1381 (Utah 1986). Therefore, it should not be considered persuasive.

Defendant cites cases that seem to assert that persons suspected of drug dealing upon a probable cause finding retain the same search and seizure protections as do ordinary citizens. State v. Pierson, 472 N.W.2d 898, 902 (Neb. 1991); State v. Cleveland, 348 N.W.2d 512 n.6 (Wis. 1984). This is absurd. Citizens who are not suspected of crimes cannot be subjected to

any unwanted police intrusions. Their rights cannot be compared to those of people whose "right to be let alone" has already been overcome by a judicial probable cause finding. See People v. Ouellette, 78 Ill.2d 511, 36 Ill. Dec. 666, 401 N.E.2d 507, 512 (1979) (Underwood, J., dissenting).

The cases cited by the defendant also implicitly presume that appellate judges, who do not conduct searches, are better able than law officers, who do conduct them, to decide the safer means of carrying out this activity. Again, the dissent in Ouellette is more persuasive: "Were I the officer obliged to search the occupied apartment of one possessing, and perhaps using, drugs, and reasonably believed to have a gun, I think I would prefer not to be warned of my arrival." 401 N.E.2d at 513 (Underwood, J., dissenting).

Finally, cases from other jurisdictions that strictly limit no-knock searches run contrary to Utah policy. In State v. Gardiner, 814 P.2d 568 (Utah 1991), the Utah Supreme Court held that citizens have no right to forcibly resist even an unlawful police search, and indeed are criminally liable if they do so. Id. at 572-576. Again, this search was lawful because of the underlying warrant. Consistent with Gardiner, the search cannot then become unlawful merely because officers anticipated that defendant might unlawfully resist it, and took reasonable measures to defeat or prevent such resistance.

Where law enforcement officers, backed by a magistrate, determine that the risk of physical harm to persons outweighs problems of fright and property damage, as contemplated by

section 77-23-10(2), that determination should be affirmed on review, so long as some minimal, case-specific evidence supports it. Such evidence was present here.

In sum, though the risks of evidence loss and physical danger in an announced search were not certain, they were sufficient to justify precautions. In proper deference to the officers, the magistrate, and the trial court, this Court should reaffirm the no-knock, nighttime authorization in this search warrant.

III. IF THE MAGISTRATE'S NO-KNOCK AUTHORIZATION IS INVALIDATED ON APPEAL, SUPPRESSION OF THE EVIDENCE IS NOT REQUIRED IN THIS CASE.

As set forth in Point I of this brief, the City believes that the existence of probable cause to search defendant's home is unassailable. This is so even if this Court applies nondeferential review of the warrant affidavit, on the basis of the controlled cocaine buy in defendant's home.

Accordingly, in response to defendant's argument that no "good faith exception" to the suppression of illegally seized evidence should apply under the Utah Constitution, the City chooses to address only the possibility that this Court may disagree with Point II of this brief, dealing with the no-knock search authorization. As follows, even if this Court decides that this no-knock authorization was improper, suppression of the seized evidence should not be required.

A. Suppression of Evidence Seized During an Improper No-Knock Search is Not Necessarily Required in Every Case.

At the outset, it is not clear that violation of the no-knock search statute, Utah Code Ann. section77-23-10 (1990), compels suppression of evidence in any case. Although Rowe follows cases from other jurisdictions holding that suppression is required when a search runs afoul of a statute, 806 P.2d at 738-39 (nighttime search), the issue is actually still open.

Other courts have concluded that suppression is not always required where evidence is seized in violation of a no-knock statute. See State v. Ford, 801 P.2d 754, 764-66 (Or. 1990), and State v. Brock, 295 Or. 15, 653 P.2d 543, 547 (1982)(suppression not required for violation of knock-and-announce or daytime search rules); People v. Payton, 45 N.Y.2d 300, 408 N.Y.S.2d 395, 380 N.E.2d 224 (1978), rev'd on other grounds, 445 U.S. 573, 100 S.Ct. 1371(1980); Commonwealth v. Mason, 507 Pa. 396, 490 A.2d 421, 423-24 (1985). See also United States v. Searp, 586 F.2d 1117, 1122,-24 (6th Cir. 1978)(nighttime search)(suppression not always required for violation of procedural rules), cert denied, 440 U.S. 921, 99 S.Ct. 1247 (1979).

Further in State v. Fixel, 744 P.2d 1366, 1368-69 (Utah 1987), the Utah Supreme Court declined to suppress evidence obtained by an officer outside his geographic jurisdiction, but who did not act in an "outrageous" manner. Holding that suppression would be a disproportionate remedy, the Court stated that "[t]he officer's conduct may warrant official sanctions, discipline, and/or civil and criminal liability." Id. at 1369.

Later, in State v. Buck, 756 P.2d 700 (Utah 1988), the Court, faced with a no-knock search that had not been authorized

in the warrant, did not hold that suppression would necessarily be the remedy. The Court did not reach this question, because nobody had been home when the no-knock entry occurred, and therefore the special concerns underlying the knock-and-announce rule had not been implicated. 756 P.2d at 701-03. The Buck concurrence stated that even if the no-knock statute were deliberately violated, some "suitable remedy" would be fashioned. Id. at 703 (Zimmerman, J., concurring, joined by Durham, J.). This suggest that suppression--the normal remedy for a constitutional violation--may not be required when officers violate Utah's no-knock statute.

It therefore seems sensible, instead of automatically suppressing evidence seized in an improper no-knock search, to consider an alternative remedy, such as ordering the offending officers or their department to pay for property damage caused by their entry. Such an alternative remedy seems especially appropriate where, as here, the underlying warrant is amply supported by probable cause. See Buck, 756 P.2d at 703. That warrant obliged the officers to seize the evidence in question; that obligation should not be undone merely because the seizure was effected by some problematic, but not outrageous, means.

B. A "Reasonable Reliance" Exception to the Suppression of Evidence Seized Pursuant to a Defective Warrant Is Appropriate Under the Utah Constitution.

In demanding suppression of the evidence, defendant also asks this Court, utilizing the Utah Constitution, to reject the so-called "good faith exception" to suppression of unlawfully seized evidence. This exception exists under the federal

constitution by virtue of United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984). Leon avoids suppression of evidence seized pursuant to a subsequently-invalidated search warrant, provided that officers conducting the search believed in good faith that the warrant was valid.

Defendant has not argued that the magistrate here abandoned his neutral role, and has blatantly misrepresented the issue of truthfulness on the part of the affiant Gardiner. Nor does she argue that the officers could not have reasonably believed that the no-knock, nighttime authorization in this otherwise valid warrant was proper. Nevertheless, casting Leon as a threat to "fundamental principles," she argues that its reasonable reliance test should be rejected under the Utah Constitution. Utah appellate courts have not yet decided this question. See State v. Thompson, 810 P.2d 415, 420 (Utah 1991), and State v. Rowe, 806 P.2d 730, 740 (Utah App.)(Garff, J., concurring)(deferring the issue), cert. granted, 817 P.2d 327 (Utah 1991).

C. Reversal of the No-Knock Authorization Would Require Overruling this Court's Precedent.

Invalidation of this no-knock, nighttime authorization will require more than rejection of the City's arguments in Point II of this brief. This Court's own construction of the no-knock statute in Rowe will also have to be overruled, either by this Court or by the Utah Supreme Court, which has heard Rowe on certiorari, and now has it under advisement.

The warrant affiant in Rowe had simply checked a preprinted no-knock request on the warrant affidavit, and stated that the sought-after contraband, narcotics in the residence, could be

easily destroyed. 806 P.2d at 732. The affiant did not allege a safety risk, another basis for a no-knock search under section 77-23-10. Nevertheless, this Court affirmed the no-knock authorization upon the "sparse" affidavit, agreeing that "[t]he small amount of drugs ordinarily found in a residential setting can be easily and quickly destroyed with even the briefest notice." 806 P.2d at 733.

Clearly this no-knock request was more complete than the one approved in Rowe. Affiant Gardiner, based on his experience, believed that the sought-after cocaine could be easily concealed or destroyed upon an announced search (affidavit at 5). His experience had also taught him that drug dealers are often armed, and this safety concern was buttressed by specific evidence of a criminal history.

This affidavit therefore alleged both statutory bases for no-knock authority, and supported these allegations better than did Rowe in its affidavit. Accordingly, the Rowe standard for no-knock searches will have to be overruled before the no-knock authority in this case can be invalidated.

D. Reliance on this Court's No-Knock Search Standard, Requires a Reasonable Reliance Exception to Suppression of Evidence.

Even if the Rowe no-knock standard is overruled, this Court should hold that it was reasonably relied upon here. This warrant affidavit was submitted on March 5, 1991, one month after Rowe was issued. Thus Rowe's construction of the no-knock statute was fresh and controlling law.

Given that all parties involved can be charged with a knowledge of Rowe, if this Court determines that no-knock authority was improperly granted here, a "reasonable reliance" exception to suppression of the seized evidence is not merely permissible, but advisable. Suppression will not deter police misconduct: affiant Gardiner exceeded this Court's requirements for a no-knock request. Nor would suppression promote better affidavit scrutiny by prosecutors and magistrates: charged with upholding the law as authoritatively construed, they must necessarily rely on fresh appellate opinions as their guides. Rowe was just such an opinion here.

Suppression of the evidence here would instead have undesirable results, not limited to defendant's evasion of criminal liability. Worse, suppression would essentially tell law enforcement officers that legal advice, magistrate authority, and contemporary case law are near-worthless guides to their conduct, and that warrants are not worth the trouble. Such a deeply cynical view should not be fostered. Indeed, such a view would erode freedom from unreasonable searches and seizures, by discouraging the interposition of the judicial branch between law enforcement officers and citizens before searches occur.

In the end, unless Rowe is both overruled and declared so outlandishly incorrect that no properly trained officer, prosecutor, or magistrate could rely upon it, suppression of the evidence seized in this no-knock search should not be ordered. Instead, the proper standard for no-knock authority should be spelled out, and prospectively applied. In the meantime, no-

knock search warrants that comply with Rowe, such as this one, should not have their fruits suppressed.

CONCLUSION

This search warrant was supported by probable cause, and the no-knock, nighttime authority granted in the warrant was in compliance with the law. Therefore, the trial court correctly denied defendant's motion to suppress the evidence seized pursuant to the warrant. For these reasons, defendant's conviction should be affirmed.

Respectfully submitted this 31st day of December, 1992.

Stephen Zollinger
STEPHEN P. ZOLLINGER
Assistant City Prosecutor

MAILING CERTIFICATE

I hereby certify that on the 31st day of December, 1992, I caused to be delivered, four (4) true and correct copies of the Brief of Appellee to Rich Mauro, Esq., Legal Defender Assoc., 424 East 500 South, Suite 300, Salt Lake City, Utah 84111.

Stephen Zollinger